It seems to me that the victorious Management Committee were quick on the draw to get rid of the plaintiff who was the only one from Team B to win the election . While it is not improper to enforce discipline, the enforcement must however be properly done. Membership of a Club is a right and an asset and as such it must be jealously guarded and protected. The Court's cannot sit idly by and watch a group of members taking over a club and the assets by unconstitutional means. While some of the facts seem to be similar to those which occurred in *Dawkins v. Antrobus* [1881] L17 Ch. 615, I am unable to follow that decision on two grounds:

(a) in that case, there was proof of the plaintiff's misconduct and he was given the opportunity to be heard but he refused; and
(b) a General Meeting of the Club, in accordance with .the Constitution, passed a resolution to expel the plaintiff whereas in our case to-day both have not been practised.

There is also no clear evidence of misconduct on the part of the plaintiff.

I accordingly order in terms of the plaintiff's claims dated 17 March 1992. The declaration must be final. *International General Electric Company of New York v. Commissioners of Customs & Excise* [1962] Ch. 748. See also *Lady Anne Tennant v. Associated Newspapers Group Ltd.* [1979] FSR 298. I can only urge that both plaintiff and defendants will bury their hatchet and, with common objective of improving the Club, both should be able to contribute and serve well.

I am sorry that my ruling has been delayed due to my recent hospitalization. I hope this has not caused too much problems to Counsel and the parties.

GOODYEAR MALAYSIA BHD.

v.

TAN KOK HAI & 2 ORS.

HIGH COURT, SHAH ALAM
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC
[SIVIL SUIT NO. 22-201-90]
20 MARCH 1993

GUARANTEE: Application for summary judgment - Appeal against decision of SAR - Conflict of evidence on affidavits - Allegation of fraud - Whether proven - Revocation of guarantee - Whether valid - Whether served on plaintiff - Section 83 Contracts Act 1950.

The plaintiff applied for summary judgment against the defendants based on a letter of guarantee executed by the defendants whereby they jointly and severally agreed to guarantee the payment by a company in respect of goods sold and delivered by the plaintiff to the company.

The defendants claimed that the letter of guarantee was blank when they signed it and that the plaintiff inserted the amount of RM800,000 after the letter of guarantee had been signed. The defendants contended that they had only agreed to guarantee upto the amount of RM100,000 and not as claimed by the plaintiff.

The defendants further contended that upon discovering the fraud they had revoked the letter of guarantee and submitted that by the reason thereof they were not liable for any amount under the said letter of guarantee.

The learned SAR gave judgment for the plaintiff for part of the amount claimed and gave unconditional leave to the defendants to defend the balance of the claim. The plaintiff appealed against the order giving leave to defend part of the claim and the defendants appealed against the whole of the decision.

Held:

[1] Having examined the affidavits of the defendants, the defence of fraud raised by the defendants was inherently improbable. In any event the principle that the plea of *non est factum* does not work in favour of a person who has shown himself to be negligent was applicable.

[2] The plaintiff seriously disputed the defendants averment that they were served with the notices of the revocation of the guarantee and the defendants did not rebut the plaintiff's averment that they were never served with the notices of revocation. In the light of the plaintiff's averment, it was incumbent on the defendants to condescend to particulars on the issue raised. On a critical analysis of the affidavits presented by both parties, it was highly improbable that there was any service of the letters of revocation on the plaintiff.

[3] In the light of a critical examination of the affidavits as a whole, the defendants had failed to show that there was a fair or reasonable probability that they had a *bona fide* defence.

[Plaintiff's appeal allowed with costs. Defendants appeal dismissed with costs].

Cases referred to:
Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 212 ***(foll)***
Bank Negara v. Mohd. Ismail [1992] 1 MLJ at p. 408 ***(foll)***
UMW Industries (1985) Sdn. Bhd. (Formerly known as UMW (Malaysia) Sdn. Bhd.) v. Kamaruddin bin Abdullah & Anor. [1989] 2 CLJ at p. 1280 ***(refd)***
D & C Normura Merchant Bankers Bhd. v. Gunung Kuari Sdn. Bhd. & 3 Ors. [1990] 2 CLJ 58 at p. 60 ***(refd)***
Bank Bumiputra Malaysia Bhd. v. Doric Development Sdn. Bhd. & 2 Ors. [1988] 1 MLJ 462 at p. 463 ***(refd)***
Banque de Paris v. de Naray [1984] Lloyd's Law Reports Vol. 1 p. 21 ***(foll)***

Legislation referred to:
Contracts Act 1950, s. 83
Rules of the High Court 1980, O. 14

For the plaintiff - N. Balan (with T. Steven)
For the defendant - M.S. Murthi

JUDGMENT

Mohd Hishamudin bin Mohd Yunus JC:
This is an appeal against the decision of the learned Senior Assistant Registrar delivered on 11 June 1991 in respect of an application for summary judgment under O. 14 of the Rules of the High Court 1980. The claim against the first and second defendants was for the sum of RM925,103.73 (together with interest), and the claim against the third defendant was for the sum of RM800,000 (together with interest). The learned Senior Assistant Registrar gave judgment in favour of the plaintiff but only for the amount of RM780,720.71; she allowed the first and second defendants unconditional leave to defend the balance sum of RM144,383.02, and the third defendant unconditional leave to defend the balance sum of RM19,279.29. The plaintiff appeals against the decision of the learned Senior Assistant Registrar in allowing the defendants unconditional leave to defend the balance of the sum claimed; and the defendants in turn appeal against the whole decision.

The plaintiffs in their affidavits claimed that by a letter of guarantee dated 24 October 1983 (hereinafter referred to as the "first guarantee") the first, second and third defendants jointly and severally agreed to guarantee the payment by Sing Loon Hing Tyre Services Sdn. Bhd. (hereinafter referred to as the "company") to the plaintiff to the extent of RM800,000 in respect of goods sold and delivered by the plaintiff to the company.

The plaintiff in their affidavits further alleged that by another letter of guarantee dated 10 October 1985 (hereinafter referred to as the "second guarantee") the first and second defendants jointly and severally agreed to guarantee the payment by the company to the plaintiff to the extent of RM200,000 in respect of goods sold and delivered by the plaintiff to the company.

The plaintiff claimed that the company was indebted to the plaintiff in the sum of RM925,103.73 for goods sold and delivered and that the defendants failed to satisfy the debt despite demands being made.

The defendants admitted that the company was indebted to the plaintiff but disputed the amount. According to the defendants, the amount of the debt was only RM180,000. The defendants admitted the validity of the second guarantee, but alleged fraud on the part of the plaintiff in respect of the first guarantee. The defendants further stated in their affidavits that under the first guarantee they had agreed to guarantee only up to the amount of RM100,000 and not RM800,000 as claimed by the plaintiff; that they had not signed a completed guarantee from but were only asked to sign every page of a blank guarantee form; and that the amount RM800,000 was subsequently inserted in the first letter of guarantee form by the plaintiff without the defendants' knowledge; and that upon

discovering the fraud, the defendants had on the 27 November 1985 served on the plaintiff notices revoking both letters of guarantee.

This allegation of fraud was set out in full in the affidavit of Tan Kok Khen, the second defendant (see encl. 6) as follows:

> 3. Saya menegaskan di sini bahawa jaminan yang diberikan hanyalah untuk pembelian maksima sebanyak RM100,000 oleh syarikat tersebut.
>
> 4. Saya sesungguhnya percaya dan mengatakan bahawa semasa gerenti pertama ditandatangani, surat gerenti tersebut belum diisi lagi. Defendan telah menandatangani setiap muka surat gerenti yang lapang, yang belum diisi dengan butir-butir, yang saya percaya telah diisikan selepas ia ditandatangani.
>
> 5. Saya percaya, selepas gerenti pertama ditandatangani, plaintif telah mengisi angka sebanyak RM800,000 tanpa pengetahuan saya. Penukaran angka ini telah disembunyikan daripada pengetahuan saya.

This first letter of guarantee was exhibited in the plaintiff's first affidavit (encl. 3, exh. TKL-1).

On the treatment of conflict of evidence on affidavits, Lord Diplock, delivering the judgment of the Privy Council in *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212 had this to say at p. 217:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself may be.

Although Lord Diplock was dealing with an application for the removal of caveat in that particular case, nevertheless the Supreme Court in *Bank Negara v. Mohd Ismail* [1992] 1 MLJ at p. 408 was of the view that the above principle of law is relevant and applicable in all cases where a Judge has to decide a case or matter on affidavit evidence.

Having examined the affidavits, I find the defence of fraud raised by the defendants as inherently improbable. No reasonable businessman (and I see no reason to assume the defendants to be otherwise) would sign a blank guarantee form regardless of the amount guaranteed, be it RM100,000 (as alleged by the defendants) or RM800,000 (as claimed by the plaintiff.

Secondly, exhibit TKL-1 does not fit the description of the first letter of guarantee as given by the defendants in their affidavit (encl. 6) in that exhibit TKL-1 does not contain signatures of the defendants on every page as alleged: it contains signatures only at pp. 4 and 5, that is to say, only at the end of the agreement. Yet there is nothing in any of the affidavits filed by the defendants (encls. 6 and 9) expressly or clearly denying exhibit TKL-1 as the very document executed by them. In paragraph 4 of encl. 6 the deponent merely alleged the insertion of the amount of RM800,000 in the first letter of guarantee.

Thirdly, on the hypothesis that it was true that the defendants were made to sign every page of a blank first letter of guarantee form, all that the plaintiff had to do, if at all they had wanted to cheat the defendants, was merely to insert the amount RM800,000 in the appropriate space in the allegedly signed p. 2 of the blank form. The defendants appear to me to be implying that the plaintiff, in carrying out their trick, had removed the allegedly signed blank pp. 1, 2, and 3 and substituted fresh pp. 1, 2 and 3 into the guarantee form. To my mind, it is extremely difficult to believe that the plaintiff, having been astute enough to cause the defendants to sign blank pages, would thereafter be so idiotic as to remove the allegedly signed blank pages 1, 2 and 3 from the allegedly pre-signed first letter of guarantee and substitute them with fresh unsigned but completed pages. With respect the defendants allegation simply does not make sense.

Fourthly, it was indeed very strange that neither the letter of revocation dated 26 November 1985, purportedly revoking the first guarantee nor the letter of revocation (also dated 26 November 1985) purporting to revoke the second guarantee mentioned anything about fraud. Instead the reason given by the defendants for the purported revocation was (to quote the first letter):

> In view of certain developments that have taken place recently and together with some changes in our management policy, we have

severally and jointly decided to revoke the above-mentioned guarantee for all transactions.

Yet, in paragraph 7 of the defendants' affidavit in encl. 6 it was clearly stated that the reason for the revocation was the discovery of the alleged fraud:

7. Seterusnya pada bulan Oktober/November tahun 1985 defendan telah mengetahui akan penipuan yang telah berlaku. Akibatnya, pada 26 November 1985, defendan telah membatalkan Gerenti pertama dan kedua.

Fifthly, one Chew Kim Choon, the Area Sales Manager of the plaintiff company had affirmed an affidavit (see encl. 8) to the effect that at the material time he was a sales representative of the plaintiff and that, on behalf of the plaintiff, he had signed exhibit TKL-1 as a witness to the signature of each of the defendants who were signatories to the first letter of guarantee. Chew Kim Choon confirmed in his affidavit that the defendants only signed at the end of the agreement and not at every page as alleged by the defendants.

Therefore, to my mind all this story about signing blank pages was highly improbable. Even on the supposition that I were to believe the defendants, still there is the principle that the plea of *non est factum* does not work in favour of a person who has shown himself to be negligent (see *UMW Industries (1985) Sdn. Bhd. (Formerly known as UMW (Malaysia) Sdn. Bhd.) v. Kamaruddin bin Abdullah & Anor*. [1989] 2 CLJ at p. 1280).

The other issue concerns the service and validity of the letters of revocation. Learned Counsel for the plaintiff contends that the notices were never served on the plaintiff. Secondly, even if they had been duly served on the plaintiff, they were still not valid since at the time of service the company was still indebted to the plaintiff to the amount of RM780,720.71.

As to the first contention, s. 83 of the Contracts Act 1950 provides:

A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

The plaintiff, in their affidavits (encls. 7 and 10), denied having received the notices of revocation. The plaintiff in their affidavit (encl. 10) referred to the words "DEPT 400" in the stamp mark (or chop) as found on each of the notices exhibited in TKK-1 of encl. 9. According to the plaintiff, "Department 400" was in fact the reference to their warehouse department in Shah Alam and that it was strange that the defendants had chosen to deliver the notices to the plaintiff's warehouse department and not to the plaintiff's address as stated in the letters of guarantee. The plaintiff further stated in their affidavit that the stamp used by their warehouse department at the material time for the purpose of acknowledging receipt of documents was in the form as shown in exhibit A of encl. 10 and not in the form as shown in the letters of revocation in exhibit TKK-1 of encl. 9. It is pertinent to note that the defendants never filed any further affidavit as a reply to encl. 10 to rebut the plaintiff's averment that they were never served with the notices. In such a situation as this where the plaintiff has seriously disputed the defendants averment that they had served the plaintiff the notices of revocation, in my view, it was incumbent upon the defendants to condescend on particulars as to the issue raised. On a critical analysis of the affidavits presented by both parties, it was highly improbable that there was any service of the letters of revocation on the plaintiff on 27 November 1985, as alleged by the defendants.

Assuming that I am wrong as regards the above finding and that I am compelled to accept as a fact that there had been a proper service of the notices of revocation on the plaintiff, still the defendants cannot be said to have raised a triable issue. For, in my opinion, by reason of s. 83 of the Contracts Act 1950, referred to earlier, the notices were bad in law. As I have pointed out, on examining the notices I find that the defendants were attempting to discharge themselves as guarantors in respect of all transactions and not merely in respect of future transactions. This was contrary to s. 83. Section 83 allows a guarantor to discharge himself, by service of notice to the creditor, only in respect of future transactions

That the defendants had already incurred debts by the time the notices were served on the plaintiff on 27 November 1985 (if at all they were served) was clearly established by the plaintiff's affidavits. In the present case, it was stated in clause 8 of the letters of guarantee that -

8. A statement of account in writing showing the indebtedness and liability of the purchaser to you duly certified by your auditors

shall be binding and conclusive against us as guarantors our respective heirs and personal representatives.

Now, the plaintiff in their further affidavit in enclosure 10 had not only produced a statement of account showing the amount RM780,720.71 as owing as at 25 November 1935, (exh. B of encl. 10) but also a certificate issued by their external auditors Messrs. Price Waterhouse dated 7 February 1991 confirming the amount due (exh. C of encl. 10). Such a certificate is binding unless there is manifest error (see *D & C Nomura Merchant Bankers Bhd. v. Gunung Kuari Sdn. Bhd. & 3 Ors.* [1990] 2 CLJ 68, at p. 60 and *Bank Bumiputra Malaysia Bhd. v. Doric Development Sdn. Bhd. & 2 Ors.* [1988] 1 MLJ 462, at p. 463). The defendants, on the other hand, never attempted to show any error in either the statement of account or the certificate.

As to the amount of RM925,103.73 claimed by the plaintiff, but disputed by the defendants, this was supported by three documents. First there was the statement of account mentioned earlier showing RM780,720.71 as the amount owing as at 25 November 1985; secondly there was the certificate (also already mentioned above) issued by Messrs. Price Waterhouse, the plaintiff's external auditors, confirming the statement of account, and thirdly there was a statement of account showing RM925,103.73 as the amount owing as at 30 November 1988 (see encl. 3, exh. TKL-3). Although I note that this second statement of account, unlike the first statement of account, was not supported by an auditors' certificate, nonetheless it is still of substantial probative value since it was confirmed by the affidavit of the Credit Manager (see encl. 10) of the plaintiff company that the statement was issued by the plaintiff's auditors. The defendants on the other hand never attempted to show that the statements of account or the certificate were erroneous. Neither did they attempt to explain the amount they admitted they owed the plaintiff. Not only that the defendants were not consistent in their averments as to the amount they alleged they owed the plaintiff. In their statement of defence (encl. 5) the defendants were not definite as to the amount owed. It was stated in vague terms in paragraph 8 of the statement of defence as follows:

8. Perenggan empat dinafikan. Syarikat tersebut tidak berhutang sepertimana yang dikatakan oleh plantif. Hutang sebenar Syarikat tersebut adalah **kurang** daripada RM180,000.

(emphasis mine.)

Yet subsequently, in paragraph 4 of the defendants' affidavit in encl. 6 the defendants, this time, appeared to be definite as to the amount. The amount of the debt was specific and was expressed in the following terms:

6. Seterusnya, saya percaya bahawa hutang sebenar Syarikat hanyalah sebanyak RM180,000 dan tidak sepertimana yang dituntut oleh plaintif.

To my mind this is a serious inconsistency and it shows a lack of candor on the part of the defendants

In *Banque de Paris v. de Naray* [1984] Lloyd's Law Reports Vol. 1 p. 21 Lord Justice Ackner had this to say on O. 14 applications (at p. 23):

It is of course trite law that O. 14 proceedings are not decided by weighing the two affidavits. It is also trite law that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, *ipso facto,* provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants' having a real or *bona fide* defence.

In the light of the above critical examination of the affidavits as a whole, it is my conclusion that the defendants have failed to show that there is a fair or reasonable probability that they have a *bona fide* defence. The plaintiff's appeal is allowed with costs, and the defendants appeal is dismissed with costs.